Supreme Court, U.S.
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No. 98-193

In The

Supreme Court of the United States

October Term, 1998

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

EDWARD L. WICKER, SR., SAMUEL D. WEAVER, THOMAS E. KLEINER, JOHN MCKEE, AND JOHN KALTENBRUNNER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Federal Employers' Liability Act, 45 U.S.C. § 5.. *passim*

STATEMENT OF THE CASE

This petition is seeking this Court's review of the Third Circuit's Opinion, written by Circuit Judge Scirica and joined by Chief Judge Becker and Circuit Judge McKee, which held that a release does not violate § 5 of the Federal Employer's Liability Act provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to those risks which are known to the parties at the time the release is signed.

As detailed below, there is no cause for this Court's review of the contention. There is no real conflict among the Circuits as to the validity of this type of release under the FELA. The Third Circuit's ruling was in conformity with precedent of this Court.

REASONS FOR DENYING THE WRIT

I. THERE IS NO REAL CONFLICT BETWEEN THE CIRCUITS AND THE ISSUE OF THE VALIDITY OF GENERAL RELEASES UNDER FELA IS NOT RIPE FOR REVIEW BY THIS COURT.

Consolidated Rail Corporation ("Conrail") has incorrectly asserted that a direct conflict exists between the Sixth Circuit's holding in *Wilson v. CSX Transportation, Inc.*, 83 F.3d 742 (6th Cir. 1996) and *Babbitt v. Norfolk and Western Railway Company*, 104 F.3d 89 (6th Cir. 1997) and the holding of the Third Circuit here.

There is no real conflict. If the workers in this matter had brought their present actions in the Sixth Circuit, the releases would have been held invalid there as well. The

same would be true if the workers in *Wilson* and *Babbitt* had brought their actions in the Third Circuit. The Sixth and the Third Circuit precedent provide additional protection to railway workers, as has been this Court's practice. *See, Kernan v. American Dredging Co.*, 355 U.S. 426, 432, 78 S.Ct. 394, 398, 2 L.Ed.2d 382 (1958). In addition, both Circuits' rulings provide clear guidelines as to what risks and injuries a release may involve.

Without a real conflict between the Circuits, this is not a matter this Court should accept for review. It is important that this Court not grant Writ of Certiorari; except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. *Wilkerson v. McCarthy*, 336 U.S. 53, 67, 69 S.Ct. 413, 420, footnote 1 (Frankfurter, J. concurring) (1949).

Clearly, this issue is one that should not consume this Court's resources. Fifty years have passed since this Court's decision in *Callen v. Pennsylvania Railroad Co.*, 332 U.S. 625 (1948), yet Conrail is only able to address only one other Circuit Court of Appeal's decision that deals with the validity of a general release under FELA. Clearly, the railroads and their workers have been able to settle their claims without the need for further guidance from this Court. As Conrail notes in footnote 6 of its brief in 1996, there were 21,117 claims and suits pending and in 1995 there were 23,206 claims and suits pending. In those two years alone the railroads were able to successfully end claims by paying out over two hundred

million dollars to injured workers without further guidance from this Court as to what claims can be released.

Given the clear guidelines established by the Third Circuit as to how a release must be drafted, it is not necessary that the Court step in at this time. Perhaps, in the future, if another Circuit Court of Appeals was to hold that a general release does not contravene the purposes of FELA and may bar a subsequent claim, this issue would be ripe for this Court's intervention. However, that has not happened and at this time there is consistency among the Circuit Courts.

II. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH APPLICABLE PRECEDENTS FROM THIS COURT, AS SUCH, CERTIORARI SHOULD NOT BE GRANTED.

Conrail misstates the holding of *Callen* to be that the validity of release of a FELA employee should be judged on the same basis as a new FELA employee. The quotation from *Callen* clearly deals only with which party bears the burden of proof in showing that a release has been tainted with invalidity, either by fraud or mutual mistake. It does not deal with the validity of a release under FELA which releases known and unknown injuries from known and unknown risks. As stated by the Third Circuit *Callen* merely stands for the proposition that releases are not per se invalid under FELA. Appendix at 15a.

It has been the holding of this Court since *Duncan v. Thompson*, 315 U.S. 1, 62 S.Ct. 422, 86 L.Ed. 575 (1942), that § 5 applies to FELA releases and not contract law alone, as recognized by the Third Circuit in this case and

this Court in *Boyd v. Grand Trunk Western Railroad Co.*, 20 S.Ct. 26, 27, 338 U.S. 896 (1949).

While it is true that there is no specific section of the statute which addresses the rights of FELA Plaintiffs to settle their claims, § 5 specifically prohibits a railroad from exempting itself from liability. This has been recognized by the Third and Sixth Circuits. This has been the holding of this Court on many occasions and the opinion of the Third Circuit in this matter is in line with that precedent.

CONCLUSION

For the reasons given above, the petition should be denied.

Dated: October 15, 1998

Respectfully submitted,

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